

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 6578  
Response To Complaint

In Re: )  
)  
LaMalfa for Congress Committee 2012, and )  
David Bauer, in his capacity as treasurer, )  
Mark Spannagel, individually and )  
Doug LaMalfa, individually. )  
\_\_\_\_\_ )

FEDERAL ELECTION COMMISSION  
2012 AUG 14 PM 12:12  
OFFICE OF GENERAL COUNSEL

In accordance with 2 U.S.C. §437(a)(1), the LaMalfa for Congress Committee 2012, and David Bauer in his capacity as treasurer (Committee) Mark LaMalfa, individually (LaMalfa) and Mark Spannagel, individually (Spannagel) (collectively, Respondents) submit this response in the above referenced matter. On July 3, 2012, each Respondent filed a Designation of Counsel with the Federal Election Commission (FEC or Commission) indicating the undersigned attorney is authorized to represent each of them in this matter.<sup>1</sup>

Factual Summary

On May 21, 2012 Samuel Mark Aanestad (Aanestad) filed a complaint with the FEC which alleged that Respondents violated various provisions of the Federal Election Campaign Act of 1971, as amended (FECA).

The allegations of the Complaint center around the June 5, 2012 California primary election (Primary). Aanestad and LaMalfa were both candidates seeking the Republican Party nomination for the 1<sup>st</sup> Congressional District (1<sup>st</sup> CD). The Committee is the principal campaign committee of LaMalfa. LaMalfa won that primary election and is a candidate for election to the 1<sup>st</sup> CD on the November 6, 2012 ballot (See Attachment 1, Spannagel Declaration (Sp. Dec.) ¶ 3). LaMalfa is also a current California State Senator, although obviously not seeking reelection to that office. Spannagel serves as the Chief of Staff in the LaMalfa State Senate office and also as the campaign manager of the Committee (Sp. Dec ¶ 4).

On April 18, 2012 a website was launch consisting of a single home page. A true and complete copy of that page is attached hereto at Exhibit A (webpage 1). In response to an apparent subpoena secured by the legal counsel for Aanestad, the legal counsel for Wixpress Ltd, issued a letter dated May 14, 2012 indicating a variety of facts related to the website. A copy of that letter is attached to the Complaint at Exhibit A and herein at Exhibit B (Wix Ltr.).

<sup>1</sup> The Complaint also names, "...the internet website located at [www.sam4congress.com](http://www.sam4congress.com)." as a separate respondent. Representation of that respondent is not included in the representation of this matter by the undersigned attorney.

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The Wix Ltr. States site was created on April 18, 2012; the username was aanestadnotforcongre.; the domain name used was SAM4CONGRESS.COM registered through GoDaddy.com; the billing address for the person paying for the site was Mark Spannagel of Penryn, CA 97663; the account was paid via a Visa credit card ending with the numbers 2

The allegations of the Complaint fall into several categories. The first set of allegations pertains to independent expenditures, and consists of the following as stated in the Complaint:

1. If expenditures associated with the web site aggregate in excess of \$250, then "Respondents" were required to file independent expenditure reports as required by 2 U.S.C. § 434(c) and 11 C.F.R. §§ 104.4, 104.5, and 109.2;<sup>3</sup> and
2. Claiming the communication to be an independent expenditure, the Complaint alleges the website failed to include the appropriate independent expenditure disclaimer required by 2 U.S.C. § 441d.

The second set of allegations pertains to political committee registration and reporting issues, consisting of the following: Respondents received contributions in excess of \$1,000 which would obligate the registration as a political committee pursuant to 2 U.S.C. § 433 and 11 C.F.R. 102.1.<sup>4</sup>

The third set of allegations in the Complaint pertains to an allegation that the webpage contained language that, "...falsely and attributing the web site to another candidate's pseudonymous supporters" in violation of 2 U.S.C. § 441h.

A fourth allegation that is not directly plead in the Complaint but which we anticipate the Commission will raise is the need for a disclaimer to indicate who paid for the webpage and whether or not it was authorized by the candidate.

Spannagel paid for all the expenses associated with the registration and the development of the Webpage (as that term is defined below). The total cost of the website registration and production was one hundred thirty-five and 22/100 (\$135.22) (Sp. Dec. ¶ 11). Those expenses were paid for by Spannagel on his personal credit card, The Golden 1 Credit Union Visa, with ending numbers 0664 and his Citi Bank MasterCard ending in 5747. No other person or entity paid for any expense associated with the website registration, production of the page or any related expense (Sp. Dec. ¶ 12).

<sup>2</sup> However, see Sp. Dec. ¶ 12. Citi Bank Mastercard used to pay for some Webpage related expenses.

<sup>3</sup> The Complaint classifies the "Respondents" as the Committee, Spannagel and the internet website located at [www.sam4congress.com](http://www.sam4congress.com). Since the reporting allegation pertains to an independent expenditure, it cannot include each of the parties lumped together in the Complaint and identified as the "Respondents" since the Committee could neither make nor therefore have an obligation to report an independent expenditure. We shall proceed on the presumption that this alleged reporting violation pertains solely to that entity who paid for the website.

<sup>4</sup> The Complaint pleads a failure to register violation pursuant to 2 U.S.C. § 433 but does not allege a reporting violation pursuant to 2 U.S.C. § 434. We will presume the Commission will pursue the § 434 violation should they make a finding of a § 433 violation.

Spannagel used his personal computer for the production of the Webpage and was responsible for the launching of the webpage. All of the work performed by Spannagel on the Webpage was performed at his personal residence. No assets, resources, goods or services of the Committee or the State Senate office were used in any fashion for the production, Webpage (Sp. Dec. ¶ 13).

Spannagel did not advise, consult or inform LaMalfa, the Committee, Gilliard Blanning, the general political consultant or with any other person who was employed, hired or retained by the Committee prior to, or during the production and launching of the website (Sp. Dec. ¶ 10).

On or about April 28, 2012 Spannagel caused a slightly different webpage to be posted on the internet, which in essence was the same document but for the removal of a tag line at the bottom of the page which read, "Free Thinkers For D'Aquisto". This amended page, webpage #2, remained up until approximately May 15, 2012 (Sp. Dec. ¶¶ 24 and 25).

During the time in which the Webpage was posted publicly, approximately April 18, 2012 through May 15, 2012, there were a total of 138 unique "hits" on the site, to include those of Spannagel and other LaMalfa supporters (Sp. Dec. 26).

The total expenses of \$135.22 were disclosed on the Committee's May 25, 2012 disclosure report as an in-kind contribution from Spannagel to the Committee (See attachments at Exhibit C).

## Arguments

- A. The first set of allegations pertaining to violations of the various FECA independent expenditure issues are all moot since the Committee disclosed the Webpage expenditures as an in-kind contribution.

There is no factual basis to proceed with allegation pertaining to the alleged independent expenditure violations.

In view of the fact that the Committee has reported the full amount of the Webpage transaction as an in-kind contribution from Spannagel, there is no factual basis upon which to proceed on the issues alleged pursuant to 2 U.S.C. § 434(c) and 11 C.F.R. §§ 104.4, 104.5, and 109.2 and 2 U.S.C. § 441d.

For this reason, Respondents request the Commission make a finding of no reason to believe related above referenced alleged independent expenditure violations.

- B. The second set of allegations pertaining to FECA violations of the political committee registration and reporting issues are moot.

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1. Factually, the Complaint is incorrect by claiming that Spannagel is an employee of the Committee; he was an independent contractor.

From the statutory perspective, Spannagel is obviously not a "candidate for federal office". The issue of jurisdiction of applying 441h requires that Spannagel be found to be an "employee" or an "agent" of a candidate, in order for the jurisdiction of 441h to be imposed upon Spannagel.

The contract which was executed between the Committee and Spannagel (Sp. Cont.) specifically stated that he was not an employee of the Committee (Sp. Decl. ¶ 7). Clearly, Spannagel was not an employee of the Committee and therefore was considered an independent contractor. This is position that Spannagel was not an employee but rather an independent contractor is reaffirmed under basic principles of agency law, which clearly distinguishes between a "servant/principal" and a "principal/independent contractor" relationship.

"A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." (Restatement (Second) Of Agency (RST)§2 (2) and (3).

An independent contractor includes all persons who contract to do something for another but who are not servants in doing the work undertaken. An agent who is not a servant is, therefore, an independent contractor when he contracts to act on account of the principal.

The Sp. Cont. in addition to prohibiting him from becoming an employee of the Committee, hired him with no obligations to perform any specific services and was not under the control of the Committee in the performance of the undertakings he elected to pursue. Even for those services Spannagel performed, he was only obligated to report to Gilliard Blanning but again he was not obligated to obtain permission and no subject to the control of Gilliard Blanning. Whatever services Spannagel provided to the Committee were of his own choice and not subject to the control of the Committee.

For these reasons, Spannagel is considered an independent contractor not an employee. Therefore, in order for Spannagel to be subject to the provisions of 441h, he must be deemed to have been an agent for the Committee.

2. The facts fail to support the ability of Spannagel to be considered an agent of the Committee.

a. *Applicable rules of agency.*

The FECA does not provide a definition of the term "agent" or "agency". The FEC Code of Federal Regulations (Regulations) defines the term agent, but only for the limited purposes of specific section of the Regulations (See 11 CFR § 109.3 "For the purposes of 11 CFR part 109 only, agent means,..."; 11 CFR §300.2(b) "For the purposes of part 300 of chapter I, agent means...").

Absent a specific statutory definition of "agent" for purposes of §441h, we turn to common principles of agency law. The applicable principles and definitions are set forth below.

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act"(RST§1).

"Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestation of consent to him." (RST§7)

The agency can be of a general or special nature; the former authorizes an agent to conduct a series of transactions involving a continuity of services and the latter, the agent is authorized to conduct a single transaction or a series of transaction not involving a continuity of service (RST§3).

The Sp. Cont. does not authorize Spannagel to undertake any binding financial or fiduciary actions on behalf of the Committee. There was no consent between the Committee and Spannagel to provide any services whatsoever. On that basis it is obvious Spannagel did not have general agency authority on behalf of the Committee.

Absent the inclusion of any specific duties for which Spannagel was to perform pursuant to the Sp. Cont., there can be no argument that the Committee provided a special nature agency authority to Spannagel. The Committee provided no consent to Spannagel to perform any specific services. No such consent was ever provided by the Committee. There is no manner by which Spannagel could act in accordance with the principal's manifestation of consent to him since there was no agreement as to what, if anything, Spannagel was to perform for the Committee.

Secondly, the Sp. Cont. provided that Spannagel would only report to the "lead consultant", namely Gilliard Blanning. The Committee exercised no control over Spannagel; that control, if any, was vested in Gilliard Blanning. The Committee exercised no control over Spannagel but correspondingly, Spannagel had no specific authority to act on behalf of the Committee.. As such, the critical component of the very definition of agency is lacking in this case. The Committee exercised no control over Spannagel. Absent such control, there cannot be a principal servant relationship and therefore no agency relationship can exist.

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transactions contemplated. An agent is not authorized to act if he believes the principal would authorize him to act if he knows the facts.

The Sp. Cont. did not mention any duties relative to operating the Committee's website, the development of an alternative website or anything of the like. The contract did not permit Spannagel to speak or act on behalf of the Committee, conduct opposition research, participate in public communication decisions or develop alternative communication venues. Spannagel did not advise, consult with or inform LaMalfa, the Committee or Gilliard Blanning prior to, or during, the production and launching of the Website, about the Website or any proposed language or component of the Website. Correspondingly, neither LaMalfa, the Committee nor Gilliard Blanning, authorized, directed or requested that Spannagel or any third party, to the knowledge of Spannagel develop, produce, launch or maintain the Webpage (Sp. Dec. ¶10).

Spannagel paid for all of the expenses associated with the production of the Webpage, which totaled \$135.22. The expenses were paid by Spannagel on his personal credit cards (Sp. Dec. ¶¶11 & 12). Spannagel used his personal computer to produce the Webpage. He performed all of his work on the Webpage from his personal residence. As such, the use of the personal computer and the use of his personal residence are exempt from the definition of contribution under the FECA (11 CFR §100.75). Spannagel performed the work on the Webpage during his personal time and not time during which he was on the payroll of the Committee or the State Senate (Sp. Dec. ¶13).

The facts overwhelming support the position that Spannagel operated far outside the terms of any authorized activity expressed or even reasonably expected pursuant to the Sp. Cont. The Committee neither consented to any of the activities related to the Webpage which were undertaken by Spannagel, nor reasonably anticipated they would be performed by Spannagel under the terms of the Sp. Cont. As such there was clearly no mutual consent or even the reasonable expectation by the Committee that such actions would be taken by Spannagel.

A master is subject to liability for the torts of his servants committed while acting in the scope of their employment (RST §218 (a)). However, a master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

- (a) The master intended the conduct or the consequences, or
- (b) The master was negligent or reckless, or
- (c) The conduct violated a non-delegable duty of the master, or
- (d) The servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation (RST §219).

The actions of Spannagel cannot be imputed to LaMalfa or the Committee based upon this agency standard. There is absolutely no evidence that the Committee/ LaMalfa/Gilliard Blanning intended the production or the operation of the Webpage. Spannagel provides in his declaration that there was no communication between himself and the Committee/LaMalfa/Gilliard Blanning regarding the Webpage. Therefore there is no basis to allege the Webpage was the intended conduct of the Committee/LaMalfa/Gilliard Blanning.



There is no evidence that the Committee/LaMalfa/Gilliard Blanning were negligent in any fashion in their activities or supervision of Spannagel regarding this transaction. There was no issue of a non-delegable duty and again there is no basis to allege Spannagel relied in any fashion upon the Committee to undertake this activity. To the contrary, Spannagel declares that he did not communicate with the Committee/LaMalfa/ Gilliard Blanning regarding this matter and was not directed by anyone to undertake the activity (Sp. Dec ¶ 10).

For these reasons, none of the actions taken by Spannagel can be the basis for imputed liability of the Committee/LaMalfa/Gilliard Blanning.

**D. The content and claims made on the Webpage were researched and supported by Spannagel with facts about each issue.**

Though the veracity of the statements made on the Webpage are not at issue under the FECA or the Complaint, a review of those items impacts on the thought process and the integrity of Spannagel's actions in creating the Webpage.

The initial question at this stage of the proceedings is "why" Spannagel would undertake to put up the Webpage and its content. This was not a close race. In April when the Webpage was launched, LaMalfa lead in private polls with 36.8% of the vote; Reed was second with 18.8% and Aanestad had less than 50% of the LaMalfa vote; he was in at 16.5%. These same numbers held up to Primary election day when LaMalfa won with 37.9%; Reed second with 24.8% and Aanestad with 14.4%. Given those numbers there was no apparent reason for Spannagel to launch the Webpage (Sp. Dec. ¶21)

Though he could not have known at the time of its April launch, the Webpage had a *de minimis* number of viewers and by any reasonable accounts could not possibly have had a material impact upon the campaign or the election results. There were only 168 unique hits on the Webpage; a total of 261 (includes duplicate hits) and 68% of those hits came from outside the 1<sup>st</sup> CD. And even those numbers need to be watered down as to impact since Aanestad sent out a copy of the page in a press release the day the Webpage was taken down causing a spike in the viewership of the Webpage (Sp. Dec. ¶¶ 26 & 27).

Spannagel's Declaration provides an insight into how this matter surfaced. The issue as to whether Aanestad was in fact a "doctor"; an "oral surgeon" is an issue that went back to state assembly campaigns in the late 1990's. Aanestad's appearance in "scrubs" for his 1990's political ads apparently was a subject of some bantering (Sp. Dec. ¶ 17). For some reason, perhaps the ballot title as "independent businessman/surgeon" for Aanestad triggered the issue with Spannagel. Spannagel undertook research of the issue. He searched the California Department of Consumer Affairs, Dental Board of California (Sp. Dec. ¶ 18). The search of that site revealed Aanestad was licensed as a DDS but there was no mention of an oral surgeon license. Further research on that site disclosed he also had a general anesthesia permit; but once again no reference to an oral surgeon license (See Attachment 2). Spannagel conducted an additional search under Aanestad for an OMS (Oral Malio-Facial Surgeon) license but there were no results that surfaced indicating a license for Aanestad (Sp. Dec. ¶ 19).

Based upon that research and the results thereof, Spannagel concluded, in good faith, that the claims of Aanestad being an "oral surgeon" were not supported by the State of California's database (Sp. Dec. ¶ 20).

The second area of conflict that apparently generated Spannagel to produce the Webpage was an on-going feud related to each candidate's "conservative credentials". An example offered by Spannagel is a March 2012 Republican Women's Club event at which a representative of LaMalfa appeared, as did Aanestad, to discuss their respective campaigns. When the LaMalfa representative stated that LaMalfa had a better record with the National Rifle Association (NRA) than did Aanestad, Aanestad became extremely caustic and publicly confronted the LaMalfa representative accusing her of lying about the record. Spannagel indicates there was substantial animosity between the two campaigns ( Sp. Dec.¶15).

It was for these reasons that Spannagel apparently wanted to take to the internet and present the issues as he saw them. He researched the votes of Aanestad, took a direct quote about Aanestad from the Record Searchlight newspaper and presented his findings about the "oral surgeon" issue (Sp. Dec.¶¶ 16 & 20).

Unlike so many of the other MUR's involving allegations of 441h (MURs 4735, 5089,4919) the content of the message in this matter was researched by Spannagel and presented in good faith based upon that research. There was never an intent to deceive or even misrepresent the voting record or stature of Aanestad (Sp. Dec. ¶28). The credibility of Spannagel's positions on these issues is obviously tied to the research and good faith effort which he made on these substantive issues. Since there was no attempt to misconstrue the substantive issues, there is no basis to believe he ever intended misrepresentation on other issues.

- E. The tag line reference to "Free Thinkers for D'Aquisto" was never intended to represent or equate to an indication of the identification of the person who paid for the Webpage and therefore does not constitute a violation of 2 U.S.C. §441h.

The 2 U.S.C. §441h violation allegation in the Complaint is based exclusively upon the single line at the end of the Webpage which reads, "Free Thinkers for D'Aquisto". The Complaint alleges, with no other evidence than the line itself, that this was intended to intimate that this group/person, the "Free Thinkers for D'Aquisto" was responsible for the Webpage. Though there was a third candidate in the race, Michael Dacquisto, to whom the line referenced, to claim that the intent was to indicate the Webpage was paid for by the Dacquisto campaign is simply not the case.

In his Declaration Spannagel states, again going back to the animosity between the LaMalfa and the Aanestad campaigns, he was attempting to draw the attention of those supporters of the third Republican candidate, Dacquisto. It was a last minute concept or "throwaway line" but he wanted those supporters of Dacquisto to focus on the poor voting record of Aanestad and the credibility issue centered around the "surgeon" issue. Spannagel was directing the message to those who may be thinking of breaking off their support of Dacquisto due his low ratings in the poll, and to make certain that if they did break with Dacquisto, they would not go on to support

Aanestad. Spannagel states, "I believed they (Dacquist supporters) should not support Aanestad under any condition, because of his voting record and lack of credibility. I readily admit tag (sic) line was awkward but that was the intent; just to get people, including supporters of Dacquist, to focus on the horrible voting record of Aanestad on important issues." (Sp. Dec ¶23).

As is noted below in section F, this is a case of a disclaimer omission, and one readily admitted. It is not an attempt at a fraudulent representation. The actions in the Plesha matter (MUR 4919) represents the type of activity that §441h is geared to address. The facts in the Tuchman matter (MUR 5089) and the Bordonaro matter (MUR 4735) each have a fact pattern that is far more troublesome than the facts presented in this case. Yet, no penalties were assessed in either of those two matters. There were facts in both of those matters of clear attempts at misrepresentations of the source of the political activity. In this matter no such evidence presents itself; it is a plain and matter of failing to include a disclaimer; an omission by Spannagel. There is absolutely no basis upon which to elevate this matter to a §441h violation.

- F. A fourth allegation, which was not specifically plead in the Complaint but which the Commission will undoubtedly raise, is the need to have a disclaimer on the webpage to indicate who paid for the communication and whether or not it was authorized by any candidate.

Complaint alleges that the Webpage constitutes an express advocacy message and as such a disclaimer notice pursuant to 2 U.S.C. §441d is required to appear on the Webpage. Respondent Spannagel does not dispute that the Webpage constitutes an express advocacy message and that a disclaimer notice should have been included to indicate that the Webpage was paid for by Mark Spannagel. Spannagel does note that since the \$132 of total expenditures were far below that of triggering political committee status and that it was not an independent expenditure there was neither a need to file as a political committee nor report as an independent expenditure. Since this was not a political committee or an independent expenditure, the thought of having to include a disclaimer did not cross his mind (Sp. Dec. ¶22)

Respondent Spannagel recognizes at this stage of the proceedings that a disclaimer in compliance with 2 U.S.C. §441d should have been included on the Webpage.

On the issue of a §441d violation, Respondent would respectfully request that this matter be transferred to the ADR program for final resolution.

#### **Conclusion:**

For the reasons stated above, Respondents request the following:

1. A finding of no reason to believe related to any of the allegations in the Complaint related to Doug LaMalfa, individually, and LaMalfa for Congress Committee and Dave Bauer, in his capacity as treasurer;

2. A finding of no reason to believe related to any of the allegations in the Complaint related to Mark Spannagel except for a violation of 2 U.S.C. 441d;
3. The matter be referred to ADR related to the aforementioned 441d violation by Spannagel;
4. Close the file.

Respectfully submitted,

Paul E. Sullivan

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Physician/Surgeon Search:

http://www2.mbc.ca.gov/LicenseLookupSystem/PhysicianSurgeon/Search.aspx (1 of 2) [5/15/2012 3:12:36 PM]

1 licenses found Data current as of Tuesday, May 15, 2012 3:12:18 PM (PST)

## Search

**City Filter (optional):**

**DISABLED**

- 10 -

**License Number:**

**DISABLED**

<http://www2.mbc.ca.gov/LicenseLookupSystem/PhysicianSurgeon/Search.aspx> (2 of 2) [5/15/2012 3:12:36 PM]



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Name	Type	Number	Status	Address	City	Zip	County
<u>AANESTAD SAMUEL MARK</u>	DDS	23797	RENEWED/ CURRENT, SELF EMPLOYED AT 1 LOCATION	1364 WHISPERING PINES LANE	GRASS VALLEY	95945	NEVADA

Record 1

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**Licensee Name:** AANESTAD SAMUEL MARK  
**License Type:** DENTIST  
**License Number:** 23797  
**License Status:** RENEWED/CURRENT, SELF EMPLOYED AT 1 LOCATION [Definition](#)  
**Expiration Date:** July 31, 2014  
**Issue Date:** January 01, 1973  
**License or Registration Class:** A  
**Address:** 1364 WHISPERING PINES LANE  
**City:** GRASS VALLEY  
**State:** CA  
**Zip:** 95945  
**County:** NEVADA  
**Actions:** No

### Related Licenses/Registrations/Permits

Number	Name	Type	Status	Actions
<a href="#">616</a>	AANESTAD SAMUEL MARK	GENERAL ANESTHESIA PERMIT	RENEWED/CURRENT, NORTHERN GA EVALUATORS	No

### Disciplinary Actions

No information available from this agency

Public Record Action(s)

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